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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In opposing our petition, respondents contend that (1) the constitutionality of Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, lacks "national importance" (Br. in Opp. 10-11); (2) the court of appeals was not obligated to rule on non-constitutional issues before deciding the constitutional question (*id.* at 11-13); (3) the court's ruling on the constitutional issue is correct (*id.* at 13-22); and (4) it would be inappropriate to remand the case for consideration of recent regulatory developments that are pertinent to the Court's resolution of the constitutional issue (*id.* at 23-27). Those arguments are unpersuasive.

1. Respondents' contention (Br. in Opp. 10-11) that the issue presented by this case lacks "national importance" is without merit. A court of appeals' "exercise of the grave power of annulling an Act of Congress" is normally enough, by itself, to call for this Court's review. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). See, *e.g.*, Robert L. Stern et al., *Supreme Court Practice* 185 (7th ed. 1993). The court of appeals' decision here raises especially serious concerns because it invalidates a central provision of the IRA, which has been aptly described as one of Congress's most important enactments affecting Indian Tribes. See Pet. 15-17.

Respondents' assertions to the contrary are not well founded. They contend (Br. in Opp. 10) that two statements in the commentary to a recent regulation implementing Section 5 of the IRA indicate that the statute is unimportant. See Pet. App. 64a-69a; 61 Fed. Reg. 18,082 (1996). Respondents disregard the context and content of those statements. The first notes that the *regulation* will not have any detrimental federalism effects, Pet. App. 66a, while the second notes that the *regulation* does not qualify as a "major rule" for certain regulatory review purposes, see 5 U.S.C. 804, because the Tribes make only a limited number of requests each year to place lands in trust, Pet. App. 67a. Those statements, which are directed to certain discrete characteristics of the new regulation for other purposes, in no way undermine the importance of Section 5 itself.

As explained in the petition (and in the numerous briefs amici curiae supporting it), the Secretary of the Interior's administration of Section 5 has great practical significance for Indian Tribes throughout the Nation. As of the date the certiorari petition was

filed, there were 439 pending applications to the Secretary to acquire land in trust status, and the invalidation of Section 5 also potentially calls into question thousands of acquisitions (encompassing an estimated 9 million acres of land) made by the Secretary under Section 5 during the past 60 years. See Pet. 17. Those considerations, coupled with the crucial role that Section 5 plays within the statutory scheme of the IRA and within federal Indian law (see Pet. 15-16, 21-22), amply demonstrate the great practical significance of the decision below upon the Secretary's administration of the IRA.

Respondents are incorrect in asserting (Br. in Opp. 10) that the decision below is inconsequential because it does not prevent Tribes from acquiring lands in fee, without the protection that trust status affords. That contention ignores the central purpose of the IRA to restore the tribal land base and promote Indian self-government and economic self-sufficiency. See *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973); Pet. 3-5. Section 5 of the IRA allows Tribes to rebuild their tribal land base by acquiring lands and placing them in the same trust status that their lands enjoyed prior to implementation of the allotment policy. See Pet. 4-5; *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992).[1]

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[1] Even with the protections provided by the Secretary's holding of land in trust status for Indians and Indian Tribes, the alienation of Indian lands and diminution of the tribal land base continues. One group of Indian Tribes notes that "for the sixteen tribes with reservations in Nebraska, North Dakota and South Dakota * * * from 1985 to 1995, a total of 46,399 acres passed from trust to fee status while 18,120 acres were taken

There is also no merit to respondents' cavalier assertion that the matter "may easily be handled by Congress which merely is required to enact a constitutionally sufficient statute." Br. in Opp. 10. The same assertion might be made in many cases in which a lower court holds an Act of Congress unconstitutional. But this Court, consistent with the respect owed a coordinate Branch under the separation of powers, has consistently granted review in such cases. In any event, Congress should not be forced to enact new legislation replacing a frequently employed 60-year-old statute in response to a highly questionable ruling by a divided panel of a lower court. This Court has the overarching responsibility for determining conclusively whether Congress has overstepped constitutional limitations. It is particularly appropriate for this Court to resolve the constitutionality of Section 5 because the Court has previously applied that provision without any suggestion that it suffers from a constitutional infirmity. See *Mescalero Apache Tribe* v. *Jones*, *supra*.

2. Respondents are incorrect in their challenge (Br. in Opp. 11-13) to the United States' submission that the court of appeals prematurely reached the constitutional issue and departed from traditional jurisprudence governing constitutional adjudication. As we explain in the certiorari petition, the court of appeals improperly reached out to decide a constitutional issue without first resolving other non-

into trust." See Brief of Amici Curiae Assiniboine and Sioux Tribes of the Fort Peck Reservation, Cheyenne River Sioux Tribe, Confederated Tribes of the Colville Reservation, Ho-Chunk Nation, Fond Du Lac Band of Lake Superior Chippewa, Puyallup Tribe, St. Croix Band of Chippewa Indians, and Standing Rock Sioux Tribe in Support of Petitioners at 3 n.2.

constitutional issues that might have obviated the need for a constitutional ruling. Pet. 18-19. Furthermore, it improperly based its analysis on hypothetical circumstances unrelated to the facts of this case or to the Secretary's history of implementing the IRA. See Pet. 20.

Respondents' assertion that the court of appeals actually resolved the non-statutory issues is simply wrong. Respondents contend that the court of appeals "clearly indicated that it did not believe that the Quiet Title Act precluded judicial review." Brief in Opp. 11. The court expressly said, however, that "we need not decide th[at] issue." Pet. App. 4a n.1. Respondents also assert that the court "determined that judicial review was unavailable because the matter was committed to the discretion of the agency," Br. in Opp. 12, but they can point to no square holding to that effect, *ibid.* To the contrary, as Judge Murphy stated in dissent:

> The court suggests, but does not decide, that the district court had jurisdiction to consider the claims brought under the [Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq*]. If so, the principle of judicial restraint should lead to consideration of those claims prior to reaching any constitutional issue. Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the [respondents].

Pet. App. 16a. Judge Murphy correctly noted that, even if the respondents' APA claims were rejected, that analysis would inform the constitutional inquiry. *Id.* at 17a.

As Justice Frankfurter stated, "[t]he 'great gravity and delicacy' of this Court's function in passing upon the validity of an act of Congress is called into action only when absolutely necessary," and "[i]t should not be exercised on the basis of imaginary and non-existent facts." *United States* v. *Lovett*, 328 U.S. 303, 329 (1946) (Frankfurter, J., concurring). Furthermore, "the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Ibid.* (Frankfurter, J., concurring). The court of appeals ignored those important principles. See Pet. 18-20.

3. Respondents argue at length (Br. in Opp. 13-22) that the court of appeals was correct in holding Section 5 unconstitutional. We have pointed out in the petition (at 20-23) the fundamental deficiencies in the Eighth Circuit's application of the non-delegation doctrine, and there will be time enough to answer respondents' other contentions in a brief on the merits if this Court grants plenary review. The question at this juncture is whether the Court should grant the petition. In that regard, we note an important consideration, recently reiterated by the Court in *Loving* v. *United States*, 116 S. Ct. 1737 (1996).

The Court ruled in *Loving* that Congress had lawfully authorized the President to promulgate aggravating factors in military capital murder cases. See 116 S. Ct. at 1751. It explained that Congress must be permitted to assign to the Executive Branch "some authority that it could exercise itself," because "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a

workable National Government." *Id.* at 1744. The Court specifically noted:

> Though in 1935 we struck down two delegations for lack of an intelligible principle, *A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), we have since upheld, without exception, delegations under standards phrased in sweeping terms. See, e.g., *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity").

Id. at 1750. The Court's decision in *Loving* underscores the extraordinary nature of the court of appeals' ruling in this case. That ruling is inconsistent with an unbroken string of this Court's decisions spanning more than 50 years. See Pet. 20-21.

4. If this Court decides to grant the petition, then it should consider whether summary action may be appropriate in this case. Respondents oppose (Br. in Opp. 23-27) the United States' suggestion that the Court should vacate the decision and remand the case to the Secretary. Contrary to respondents' assertions (*id.* at 23), the United States has made that suggestion out of respect for, rather than in derogation of, the Court's interest in managing its docket. See Pet. 23-26.

We have explained in the petition and herein that the court of appeals invalidated Section 5 of the IRA on non-delegation grounds without resolving whether Congress has provided for judicial review of the Secretary's decisions under that provision. As Judge Murphy explained, Pet. App. 16a-17a, the availability

of judicial review can be an important factor in the non-delegation inquiry. See Pet. 23-24. The Secretary of the Interior has now taken the position, through the issuance of regulations facilitating judicial review, that review is available under the APA of the Secretary's decision to acquire trust lands before the United States actually obtains title. See Pet. App. 64a-69a. It is therefore appropriate to remand the case for reconsideration in light of that development, which may obviate the need for this Court's review. See Pet. 25-26.

As we explain in the petition, the Secretary of the Interior's regulation departs from and supersedes the position taken by the United States in litigation in the lower courts. See Pet. 24. But contrary to respondents' argument (Br. in Opp. 23-24, 26), it does not reflect an "unfair or manipulative litigation strategy." Quite the contrary, the government's change in position stems from its continuing obligation to reexamine, at all stages of the litigation, whether the government's legal positions are appropriate in light of the evolution of the controlling legal principles and the government's experience in administering the statute. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996) (according deference under *Chevron* to a regulation prompted by the litigation of the underlying suit).[2]

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[2] Respondents make much of the fact that the United States had advocated its now superseded position in its brief in opposition in *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, cert. denied, 475 U.S. 1011 (1986). Since that time, however, this Court has refined the scope of the exception to judicial review provided in 5 U.S.C. 701(a)(2). See, *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182, 190-193 (1993). It is not "unfair" or "manipulative" for the government to reconsider its position on a continuing basis in light of this Court's rulings and other developments.

The federal government does not suggest a GVR to gain a tactical advantage.[3] Instead, the United States suggests that course because it would result in the most efficient use of the Court's limited resources. The remand that we propose would allow the parties to put forward a full exposition of the relevant facts. Respondents then would have an opportunity to seek judicial review based on objections made part of the administrative record. A remand to the Secretary also would ensure that respondents can obtain full judicial review of their statutory and constitutional objections to the trust acquisition. See Pet. 26 n.16. This Court would then be able, if necessary, to review any pertinent issues on the basis of a full record and a full consideration of all relevant legal issues by both courts below.

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[3] Indeed, the Lower Brule Tribe, which requested the trust acquisition that respondents challenge in this case, as well as other Indian-Tribe amici, join respondents in opposing our suggestion of a remand to the Secretary. See Brief for Lower Brule Sioux Tribe as Amicus Curiae in Support of Petition for a Writ of Certiorari at 10-15; and Brief for Amici Curiae Shakopee Mdewakanton Sioux (Dakota) Community, Upper Sioux Community, Grand Portage Band of Chippewa Indians, Red Lake Band of Chippewa Indians, and Sisseton-Wahpeton Sioux Tribe in Support of Petition for Writ of Certiorari at 17-18.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to vacate the judgment of the district court and remand the matter to the Secretary of the Interior for reconsideration. In the alternative, the Court should grant plenary review.

Respectfully submitted.

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